Guideline Sentencing Update

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Determining the Sentence

Restitution

Fourth Circuit holds that final decisions about amount of restitution and schedule and amounts of payments cannot be delegated to probation officer. The district court ordered that "defendant shall make restitution of not less than $6,000.00 but not more than $35,069.10, in such amounts and at such times as may be directed by the Bureau of Prisons and/or the probation officer. Restitution payments of not less than $100.00 per month shall be made during the period of supervised release and payments shall be greater if the probation officer determines the defendant is capable of paying more. . . . Restitution in this case, just like in any other case, can be adjusted appropriately by the probation officer or the Court, depending on the defendant's ability to pay, should that change either upwardly or downwardly."

The appellate court remanded. "The question presented in this case is whether the court may . . . delegate to a probation officer the authority to determine, within a range, the amount of restitution or the amount of installment payments of a restitution order. We hold that this delegation from a court to a probation officer would contravene Article III of the U.S. Constitution and is therefore impermissible. . . . Sections 3663 and 3664 of Title 18 clearly impose on the court the duty to fix terms of restitution. This statutory grant of authority to the court must be read as exclusive because the imposition of a sentence, including any terms for probation or supervised release, is a core judicial function. . . . In this case, the district court appears to have delegated to the probation officer the final authority to determine the amount of restitution and the amount of installment payments (albeit within a range), without retaining ultimate authority over such decisions (such as by requiring the probation officer to recommend restitutionary decisions for approval by the court). The order was understandably fashioned to address a situation where the defendant did not have assets to pay restitution immediately but had the capacity to earn money for payment in the future. . . . The problem is a difficult one, and we recognize that district courts, to remain efficient, must be able to rely as extensively as possible on the support services of probation officers. But making decisions about the amount of restitution, the amount of installments, and their timing is a judicial function and therefore is non-delegable."

U.S. v. Johnson, 48 F.3d 806, 807–09 (4th Cir. 1995). *Accord U.S. v. Porter,* 41 F.3d 68, 71 (2d Cir. 1994); *U.S. v. Albro,* 32 F.3d 173, 174 (5th Cir. 1994) (timing and amount of payments); *U.S. v. Gio,* 7 F.3d 1279, 1292–93 (7th Cir. 1994) (same). *But cf. U.S. v. Clack*, 957 F.2d 659, 661 (9th Cir. 1992) (indicating court may set upper limit of total restitution and delegate to probation officer timing and amount of payments).

See *Outline* at V.D.1.

Departures

Mitigating Circumstances

Second Circuit affirms downward departure based on small quantities of drugs distributed by defendants at any one time during conspiracy. Two defendants were low-level employees in a drug conspiracy. Although they handled only small amounts of drugs at any one time, they worked for several months and, under the Guidelines, were held responsible for 7 and 2–3 kilograms of crack cocaine, yielding minimum sentences of 235 and 188 months. However, the sentencing judge thought this result overstated defendants' culpability and looked at their conduct in terms of the "'quantity/time factor'—what the Judge explained as 'the relationship between the amount of narcotics distributed by a defendant and the length of time it took the defendant to accomplish the distribution.'" Reasoning that Congress authorized severe sentences mainly for "stereotypical drug dealers" who move large amounts of drugs and make lots of money, and that "those who deal in kilogram quantities of narcotics are more culpable than the street peddler who sells $10 bags," the court determined that "the 'quantity/time factor' was a factor that had not been 'adequately taken into consideration by the Sentencing Commission in formulating the Guidelines'" for those who deal in small quantities over a long period. In setting the extent of a departure for such defendants, the court concluded that "the appropriate time period that would correlate culpability (and hence punishment) with drug quantity should vary depending on the defendant's role, [and] the appropriate period for a sporadic street-level dealer might be one day, for a more regular distributor, one week, and for those involved at higher levels of a narcotics

operation, one month." The court used the weekly figure for these defendants and based the departure sentences on the amount of drugs that the conspiracy distributed during the time they were actually working in an average week.

The appellate court affirmed. "[W]e are persuaded that, at least as to defendants whose attributable aggregate quantities place them at the high end of the drug-quantity table, where sentencing ranges *exceed* the significant mandatory minimum sentences established by Congress, Judge Martin properly concluded that the normal guideline sentence may, in some circumstances, overrepresent the culpability of a defendant and that the 'quantity/time factor,' which was not adequately considered by the Commission, was available as a basis for departure. . . . The quantities attributable to [defendants] subjected them to guideline sentences of more than nineteen and fifteen years, respectively, they worked for modest wages, and they were not shown to have any proprietary interest in the drug operation of their employers. Judge Martin reasonably concluded that guideline sentences of more than fifteen years, based on aggregate drug quantities reflecting sales of approximately 50 grams per day, overstated the culpability of these two defendants. And his selection of a one-week interval for application of the 'quantity/time factor' did not render the extent of his departure 'unreasonable,' *see* 18 U.S.C. § 3742(e)(3) (1988), where it resulted in a ten-year sentence, not subject to parole." The court noted that it "need not decide whether the 'quantity/time factor' can be a basis for departure as to defendants whose base offense level is not at the high end of the drug-quantity table." Nor did it decide whether such a departure would be precluded by recently added Note 16 in §2D1.1, which authorizes departures in limited circumstances for certain low-level offenders with high offense levels: "The limitations of Note 16 can have no restrictive effect upon the appellants, since their offenses were committed prior to the November 1, 1993, effective date of Note 16."

The court did, however, remand a departure for a third defendant who had sold small amounts of heroin and was not subject to a long sentence. "It simply cannot be said that a guideline sentencing range of 51 to 63 months, indicated by his aggregate quantity of four ounces of heroin bought and resold during a four-month period, overstated his culpability. Application of the 'quantity/time factor' to a person in Abad's circumstances would precisely realize the Government's apprehension that the entire structure of the Commission's drug-quantity table was being abandoned."

U.S. v. Lara, 47 F.3d 60, 63–67 (2d Cir. 1995).

See *Outline* generally at VI.C.5.a.

Substantial Assistance

Seventh Circuit holds that denial of Rule 35(b) motion was improperly based on factors unrelated to defendant's cooperation. Defendant testified for the government in several trials and post-trial hearings in the three years after he was sentenced. The government filed a Fed. R. Crim. P. 35(b) motion to reduce defendant's sentence for his substantial assistance, but the district court denied it. The appellate court reversed, concluding that "the district court intermixed Lee's claims with its criticisms of procedures and conduct by the former U.S. attorneys [in related] cases thereby confusing the proceedings and depriving Lee a fair opportunity for consideration."

The court found that "[t]he prosecution, Lee's former counsel and Lee all testified to Lee's helpfulness and continuing cooperation which extended beyond one year, including some information not known by the defendant until one year or more after imposition of his sentence. The proof was not in dispute. The district court, however, focused its ire on perceived coverup motives from the prosecution." The decision to deny relief "did not relate to the proof offered during the hearing on Lee's cooperation," but rather to "the judge's dissatisfaction with the performance and conduct of the [government attorneys]. . . . Lee's rights were not adequately considered by the district judge who conducted a wide-ranging criticism and dialogue on the misconduct of government counsel in the [related] cases and seemed to charge Lee with complicity because he, as a witness in those cases, accepted favors from the government." While the district court's concerns may be legitimate, "such blame should [not] extend to Lee. . . . We think Lee has shown entitlement to relief of a reduced sentence, [and] conclude that the trial court abused its discretion in the manner in which it conducted the hearing which resulted in denial of relief to Lee on improper grounds."

U.S. v. Lee, 46 F.3d 674, 677–81 (7th Cir. 1995).

See *Outline* generally at VI.F.4.

Offense Conduct

Calculating Weight of Drugs

Eighth Circuit holds that kilogram conversion ratio for marijuana does not require seizure of live plants. Defendant was convicted on several charges related to a marijuana growing and distribution operation that ended in 1991 when the marijuana farms were seized. Using evidence of the number of plants that defendant was responsible for during the course of the operation, the district court followed §2D1.1(c) at n.* and converted each plant into one kilogram of marijuana to set the offense level. Defendant ap-

pealed, arguing that this conversion ratio should be applied only to live plants and that the marijuana attributed to him had already been harvested.

The appellate court affirmed, reasoning that a "legitimate goal of §2D1.1(c) is to punish those guilty of offenses involving marijuana plants more severely in order to get at the root of the drug problem. In the present case . . . there was considerable evidence of Wilson's participation in the planting and cultivation of marijuana plants. Thus, following the plain language of the guidelines, this must be an offense 'involving marijuana plants.' *See* U.S.S.G. §2D1.1(c). Accordingly, we hold that where, as here, the evidence demonstrates that an offender was involved in the planting, cultivation, and harvesting of marijuana plants, the application of the plant count to drug weight conversion of §2D1.1(c) is appropriate."

U.S. v. Wilson, 49 F.3d 406, 409–10 (8th Cir. 1995). See the summary of *Wegner* in 7 *GSU* #7 for other cases on this issue.

See *Outline* at II.B.2.

General Application

Relevant Conduct

D.C. Circuit holds that conduct must be related to offense of conviction, not merely to other relevant conduct, to be used under §1B1.3. Defendant pled guilty to one fraud count (count four) and had three other fraud counts dismissed. All three dismissed counts were used as relevant conduct in setting the offense level. The appellate court affirmed the use of counts one and two, holding that although they were "separately identifiable" from the offense of conviction they were "similar in nature"—all involved presenting a counterfeit check to obtain money or goods—and, at three months apart, close enough in time to reasonably conclude they were part of the "same course of conduct" under §1B1.3(a)(2). The third dismissed count, however, a credit card fraud, "is both separately identifiable from count four and of a different nature. That counts three and four both involved fraud to obtain money is not enough. While substantial similarities exist between count three and counts one and two—they all involved the same alias and occurred within two months—the government must demonstrate a connection between count three and the *offense of conviction*, not between count three and the other offenses offered as relevant conduct. The credit card fraud in count three is thus not part of the same course of conduct as the offense of conviction. The district court committed clear error in treating it as relevant conduct."

U.S. v. Pinnick, 47 F.3d 434, 438–39 (D.C. Cir. 1995).

See *Outline* at I.A.2.

Second Circuit holds that the Guidelines require a particularized finding of the scope of the criminal activity that defendant jointly undertook with others. Defendant was one of many sales representatives in a fraudulent loan telemarketing scheme. Although it was uncontested that defendant knew the scheme was fraudulent, no evidence was presented that his involvement extended beyond his own sales efforts or that he had any other role or participation in the scheme. However, the district court held defendant responsible for the entire loss caused by the fraud, finding that this was a jointly undertaken activity and the conduct of the other participants was reasonably foreseeable to him.

The appellate court remanded because there was no finding that the acts of other participants were within the scope of defendant's agreement. For relevant conduct involving others, the Guidelines "require the district court to make a particularized finding of the scope of the criminal activity agreed upon by the defendant. . . . [T]hat the defendant is aware of the scope of the overall operation is not enough to hold him accountable for the activities of the whole operation. The relevant inquiry is what role the defendant agreed to play in the operation, either by an explicit agreement or implicitly by his conduct." Here, the evidence shows that defendant's agreement "was limited to his own fraudulent activity and did not encompass the fraudulent activity of the other representatives. His objective was to make as much money in commissions as he could. He had no interest in the success of the operation as a whole, and took no steps to further the operation beyond executing his sales." The court noted that, because the government may not have had notice that it needed to show evidence of defendant's agreement as outlined in this opinion, it may try to do so on remand.

U.S. v. Studley, 47 F.3d 569, 574–76 (2d Cir. 1995).

See *Outline* at I.A.1.

Adjustments

Multiple Counts—Grouping

Sixth Circuit holds that multiple counts from different indictments may be grouped. Defendant was charged with multiple offenses in two different indictments and pled guilty to one count from each indictment. The district court determined the offense level for each count and then applied the multiple count adjustment under §3D1.4 to reach a combined adjusted offense level. Defendant argued that it was improper to apply §3D1.4 to counts from different indictments.

The appellate court affirmed. "Even though Part D of Chapter Three contains no explicit language ap-

plying §3D1.4 to multiple counts in separate indictments, the absence of such a statement is of no moment. First, there is no language in Part D of Chapter Three prohibiting the application of §3D1.4 to counts in separate indictments. Second, U.S.S.G. §3D1.5 states '[u]se the combined offense level to determine the appropriate sentence in accordance with the provisions of Chapter Five.' In order to apply a sentence to multiple counts in separate indictments pursuant to §5G1.2, a combined offense level must first have been determined which incorporates the counts from the separate indictments. Thus, in order to make sense, §3D1.4 must be read to apply to counts existing in separate indictments in which sentences are to be imposed at the same time or in a consolidated proceeding. . . . The only logical reading of U.S.S.G. §§3D1.1–5 and 5G1.2 requires that §3D1.4 apply to multiple counts in separate indictments."

U.S. v. Griggs, 47 F.3d 827, 831–32 (6th Cir. 1995). *See also U.S. v. Coplin,* 24 F.3d 312, 318 & n.6 (1st Cir. 1994) ("§5G1.2 would not make much sense unless we also assumed that the grouping rules under chapter 3, part D had previously been applied to counts 'contained in different indictments . . . for which sentences are to be imposed at the same time.' Accordingly, we read this concept into chapter 3, part D.").

See *Outline* generally at III.D.1.

Sentencing Procedure

Procedural Requirements—Notice

Seventh Circuit holds that testimony from codefendants' sentencing hearings may not be used to increase defendant's offense level unless defendant has adequate notice. Defendant received an aggravating role adjustment under §3B1.1(c), despite the fact that a similarly situated codefendant did not and the government stated at the sentencing hearing that it would be inappropriate and did not present any evidence to support it. The court based the enhancement on testimony about defendant at the sentencing hearings of other defendants. Neither defendant nor the government had notice before the hearing that the court intended to use that testimony.

The appellate court remanded after applying "a two-prong inquiry: first, was the specific evidence considered by the court from the prior sentencing hearings previously undisclosed to [defendant], and second, if he had no prior knowledge, was he given a reasonable opportunity to respond to the information." The court first concluded that although most of the information used to justify the enhancement was in the presentence report, "certain significant evidence taken into account by the district court was not disclosed to [defendant] before the hearing."

On the second issue, the court found that defendant "was on notice of a dispute between himself and others and was given some opportunity to respond to the new evidence before he was sentenced. . . . On balance, however, we do not believe [he] was given sufficient notice to allow him meaningfully to rebut the prior testimony. Because the government backed away from a role increase, [defendant] knew that no new evidence would be introduced at the hearing to support such an increase. Additionally, . . . he knew that the same judge had found the evidence insufficient to support such an increase for [the codefendant]. . . . Thus, when they arrived for the sentencing, [defendant] and his attorney reasonably would not have anticipated the need for evidence to rebut new, damaging information . . . . We therefore conclude that [defendant] did not receive sufficient notice, as required by Rule 32, so that he could comment meaningfully on the court's decision to impose a role increase."

U.S. v. Blackwell, 49 F.3d 1232, 1237–40 (7th Cir. 1995).

See *Outline* at IX.D.2 and E.

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